ATTORNEY FOR APPELLANT:

JEFFRY G. PRICE
Peru, Indiana

ATTORNEY FOR APPELLEE:

MATTHEW M. GOLITKO
Bolinger Golitko
Kokomo, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN COMERFORD,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 52A02-0606-CV-446
	)	
BETH COMERFORD,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Robert R. McCallen III, Special Judge
Cause No. 52D01-0506-DR-251

April 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Kevin Comerford ("Husband") appeals the trial court's distribution of marital assets upon the dissolution of his marriage to Beth Comerford ("Wife"). He raises four issues for our review, which we consolidate and restate as:

1. Whether the trial court abused its discretion in distributing the marital assets.

2. Whether the trial court abused its discretion in awarding Wife attorney's fees.

On cross-appeal, Wife raises two issues for our review, namely:

1. Whether the trial court accurately calculated the distribution of the assets pursuant to its order.

2. Whether the trial court erroneously determined the value of Husband's assets in Comerford & Co., CPAs ("Comerford & Co.").

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on November 30, 1985. On February 17, 2005, Wife filed for dissolution of the marriage. While married, they had two sons. The couple's youngest son is autistic and requires extensive assistance from service providers and his parents.

Wife is a hairdresser with one year of education at beauty school, and Husband is a certified public accountant, having received an undergraduate degree from the University of Notre Dame in 1978. On January 1, 1987, Husband helped organize Comerford & Co., in which Husband maintained at least a one-third interest throughout the marriage. At the time of the trial court's order distributing the marital assets, Wife earned $370 per week, while Husband earned $2,385 per week.

The trial court entered the dissolution decree on May 11, 2006, stating in relevant part:

> 6. [P]ursuant to [Indiana Code] § 31-15-7-5 the court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the [recited statutory] factors, that an equal division would not be just and reasonable. Exhibit "A" reflects this division.
>
> * * *
>
> Based upon the statutory factors and after giving due consideration to the evidence presented, and particularly the disparity between the parties['] income and earning potential and the additional responsibilities placed upon Wife as the physical custodian of the parties['] autistic child, which diminishes her ability to work more hours, the Court has concluded that division of the marital property on a substantially equal basis is not appropriate and that an unequal division favoring Wife would be just and reasonable. . . .
>
> * * *
>
> 6. [sic] Husband should pay an additional sum of $8,000.00 toward Wife's attorney fees within 30 days and each party shall bare [sic] the remaining cost of any unpaid expert fees or other litigation expenses they may have incurred.

Appellant's App. at 23-24. The trial court then awarded Wife 65% of the marital assets. The trial court's Exhibit A, attached to its order, listed the various marital assets and the trial court's findings of their respective values. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

When the trial court has entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment.

Staresnick v. Staresnick, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id. We review conclusions of law de novo. Id.

Issue One: Marital Assets

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Sanjari v. Sanjari, 755 N.E.2d 1186, 1191 (Ind. Ct. App. 2001). When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. Bartley v. Bartley, 712 N.E.2d 537, 542 (Ind. Ct. App. 1999). We may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. Dall v. Dall, 681 N.E.2d 718, 720 (Ind. Ct. App. 1997). Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. Bartley, 712 N.E.2d at 542.

Indiana Code Section 31-15-7-5 provides that a trial court may consider the following factors in distributing the marital estate between the parties: (1) the

contribution of each spouse to property acquisition; (2) the extent to which the property was acquired by each spouse prior to the marriage or through gift or inheritance; (3) the economic circumstances of each spouse at the time of property disposition; (4) each spouse's conduct in disposing of or dissipating property during the marriage; and (5) the earnings or earning ability of each spouse as related to a final property division.

Husband contends that several of the trial court's findings concerning the division of the marital estate are clearly erroneous. We address each contention in turn. We then address the trial court's division of the marital assets.

Certificates of Deposit

First, Husband maintains that the trial court erroneously omitted from its identification of marital assets a certificate of deposit, valued at $19,232.74. But the trial court's list of marital assets lists a certificate of deposit valued at $19,042.51. And Husband's testimony on direct examination reveals that the value of that certificate was disputed, not that there were two certificates:

> Q Okay . . . item 15 [on Husband's proposed list of assets], the National City savings of $19,042.00, we agree on that?
>
> A Yes. I think there's some confusion there though . . . .
>
> Q Mmmhmm (positive response).
>
> A That we couldn't really identify what it is. Um, if you really look at it, I believe that those two items are actually the same thing. I think where they have it down as a savings account . . . I've got a feeling that that is the CD number 4857.
>
> Q Okay. So.
>
> A So I think those are duplicated.

Q Okay. And then . . .

A And then the actual value is $19,232.74.

Q Okay.

THE COURT: That does not have a number on mine.

MR. PRICE [Husband's counsel]: And I think that's why, Judge, because he wanted to show that it's one of the two and he believes it's $19,232.74. It's not two items, it's one item.

Transcript at 325-26. We interpret Husband's testimony, and the statements of his counsel, to be a concession that there was no separate certificate as now alleged. Rather, the testimony makes clear that Husband simply disputed the amount the certificate was worth and that there was evidence that the certificate was worth either $19,042.51, as the trial court found, or $19,232.74. Hence, Husband's argument on this issue amounts to a request that we reweigh the evidence, which we will not do. See Dall, 681 N.E.2d at 720.

Account Withdrawals

Husband next contends that the trial court erred in not recognizing two $30,000 withdrawals, one from the parties' American Trust bank account, number 190-0, and the other from the parties' Beacon Credit Union savings account. In its order, the trial court found the American Trust account to be worth $107,717.46, and it found the Beacon Credit Union account to be worth $47,622.14. It is undisputed that Wife filed for dissolution on February 17, 2005, and that the American Trust and Beacon Credit Union withdrawals occurred on March 1, 2005, and April 18, 2005, respectively.

Although Husband contends the trial court erred with respect to its valuation of

those two accounts, "our supreme court has made it clear that the trial court has discretion to value the marital assets at any date between the date of filing the dissolution petition and the date of the hearing." Bertholet v. Bertholet, 725 N.E.2d 487, 497 (Ind. Ct. App. 2000) (citing Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996)). Further, Indiana Code Section 31-9-2-46 states that "'[f]inal separation' . . . means the date of the filing of the petition for dissolution of marriage . . . ." Here, the trial court plainly stated in its order that "the parties' property and debts and the values associated therewith are found to be a fair and reasonable valuation of the parties' assets and debts at the time of separation." Appellant's App. at 20. Thus, the trial court did not consider the two $30,000 withdrawals because those withdrawals occurred after the date of the filing of the petition for dissolution.

Husband argues, however, that allowing the balance of those accounts at the time of the filing of the petition for dissolution to be utilized rather than after the withdrawals "elevates the notion of value to an absurdity," and that, "[i]n effect (as to both the American Trust and the Beacon accounts)[,] the trial court has counted the money twice." Appellant's Reply at 4-5. In other words, Husband contends that, because the two $30,000 withdrawals were used to establish financial accounts for the parties' children, the trial court abused its discretion by double counting the money. But the trial court's order specifically exempted the children's accounts from consideration. Further, the "choice of an early valuation date for an asset, which decreases in value, is not necessarily an abuse of discretion." Bertholet, 725 N.E.2d at 497 (citing Reese v. Reese, 671 N.E.2d 187, 191 (Ind. Ct. App. 1996)). Hence, the trial court did not abuse its

discretion in valuing those accounts, and it did not double count the withdrawn funds.

Armada Funds

Third, Husband asserts that the trial court did not include all of Wife's Armada Funds accounts in its order. Specifically, Husband maintains that the trial court ignored evidence of three Armada Funds accounts, each closed in April of 2005, totaling $26,257.77. In its order, the trial court included two Armada Funds accounts: account 764, valued at $14,048.59, and account 019, valued at $8,430.97. During Husband's direct and redirect examinations, the following exchanges took place regarding the other three Armada Funds accounts:

> Q The next three items [on Husband's proposed asset list] are identified as Armada, and you're simply showing that . . . Wife had those items and sold them in April?
>
> A Those items are not listed on her account, they were retirement accounts that she sold and transferred to another investment in April of '05.
>
> * * *
>
> MR. PRICE: Judge, I just talked to my client. . . . He believes he has . . . an exhibit showing Wife's liquidation of the other three . . . Armada accounts that he's referring to. . . .
>
> MR. GOLITKO [Wife's counsel]: I think what happened Judge is those other three accounts that he has were sold and transferred into these two here. Or just rolled over there. Never cashed out.
>
> THE COURT: Obviously, everybody's disputing that. That's the big issue.
>
> MR. GOLITKO: Right. And that's what that whole exhibit is that shows the previous one, and if you keep flipping through, it shows that it was transferred over to these . . . .

Transcript at 336, 366-67 (emphasis added). Subsequently, Husband submitted evidence

of the other three Armada accounts, which were closed in April of 2005, after the filing of the petition for dissolution.

Wife responds to Husband's appeal on this issue by emphasizing that the separate existence of the funds was disputed and that it was the trial court's prerogative to weigh the evidence before it in resolving that conflict. We must agree with Wife. Husband conceded in his direct examination that the three disputed accounts were "sold and transferred to another investment in April of '05." Id. at 336. Wife's counsel echoed that statement to the trial court in suggesting that the contested funds were incorporated into the uncontested funds. Further, the conclusion that the contested accounts were consolidated into the uncontested accounts is supported by the overall balance of the contested funds, $26,257.77, in comparison with the overall balance of the uncontested funds, $22,479.56. And the difference in overall value is based on the trial court's selection of a valuation date. Although that date is different for the Armada Funds accounts than for other assets, we note that "[t]here is no requirement in our law that the valuation date be the same for every asset." Wilson v. Wilson, 732 N.E.2d 841, 845 (Ind. Ct. App. 2000). Thus, the trial court's finding that only two Armada Funds accounts existed is not clearly erroneous.

Cole Brothers

Fourth, Husband argues that the trial court erroneously omitted the Cole Brothers Water ("Cole Brothers") loan guarantee totaling $118,750, on which Husband makes annual interest and principal payments. However, Husband's Exhibit T, submitted to the trial court, listed this debt as part of the value of another business, the Miami Beverage

Company ("MBC"). Therefore, the trial court's order, assigning a zero value to Cole Brothers, is not clearly erroneous. Insofar as Husband's appeal on this issue is an appeal of the trial court's valuation of MBC, we discuss that issue below.

Wife's Inheritance

Fifth, Husband maintains that the trial court erred in not considering an undisputed inheritance, valued at $30,000, that Wife received during the marriage. It is also undisputed that Husband received approximately $31,600 in cash gifts from his parents, which Husband reinvested in the parties' property. In its order, the trial court stated:

> The marriage of the parties lasted almost 20 [years]. Undoubtedly some of the significant marital assets were gifts from Husband's parents. However, the Court also recognizes the efforts of both of the parties in working together, maximizing their investments and assets, improving their lifestyle and raising their children. In that regard their relationship was a true partnership, each bringing their unique talents and using them to the best of their abilities. As a result, it would not be equitable to award a greater percentage of such assets to Husband by virtue of such gifts. Likewise, to treat the parties fairly, the inheritance that Wife received from her aunt prior to the filing of this proceeding should be considered in the same way.

Appellant's App. at 20. In other words, the court considered the inheritance and other gifts to be part of the marital pot. However, the trial court's list of assets and debts includes no discussion about either parties' gifts.

Wife contends that the court's discussion regarding their respective gifts, followed by the court's omission of the gift values from its asset list, indicates that the court did not believe Husband when he testified that he reinvested his cash gifts into the parties' property. Therefore, Wife continues, the omission of Husband's gifts balances the omission of Wife's inheritance. But Wife never disputed Husband's assertion of reinvestment. Hence, when the trial court, in distributing the assets into which Husband

had reinvested his gifts, also failed to distribute Wife's inheritance, it contradicted its stated intent to consider those assets as part of the marital pot. Thus, we reverse the trial court's omission of Wife's $30,000 inheritance and direct the court to modify its order to include 65% of that inheritance as an asset of Wife and 35% as an asset of Husband.

Property Taxes

Sixth, Husband argues that the trial court erred by not recognizing his tax liability on the marital residence. Wife agrees that the trial court omitted the tax burden of the marital residence, and she does not dispute that that burden totals $2,030.70. Indeed, Wife maintains that the court found that Husband should fully incur that burden. While the court omitted that tax burden from its order, the trial court did find the tax liability of the parties' rental property to total $1,866.17. The court awarded that property and its corresponding tax liability to Husband. As Husband was also awarded the marital residence, the corresponding tax liability for that property was erroneously omitted from Husband's marital debts. Hence, we reverse the trial court's omission of the $2,030.70 tax liability and direct the court to modify its order accordingly.

Premarital Assets

Seventh, Husband asserts that the trial court erroneously omitted a number of his premarital assets from its order. Specifically, Husband contends that the court erred in ignoring evidence regarding the value of a premarital home, retirement accounts, a vehicle, bank accounts, and furniture, for a total premarital net worth of $119,720. However, although the trial court did not specifically address those assets, that omission was not clearly erroneous given the court's explicit finding regarding "the efforts of both

of the parties in working together [and] maximizing their investments and assets." Appellant's App. at 20.

In Taylor v. Taylor, 420 N.E.2d 1319, 1323 (Ind. Ct. App. 1981), we stated:

> The effect of one spouse bringing a vast amount of property into a marriage must be considered by the court. However, the effect of that contribution may in a given case be largely discounted where the property is consumed by the parties during married life or where it, or its equivalent, is maintained or increased through the efforts of both during many years of marriage. Depending upon the total circumstances it may be just and reasonable in either instance to accord little weight to a particular spouse's initial contribution in determining the final disposition of property.

(Quoting In re Marriage of Osborne, 174 Ind. App. 559, 369 N.E.2d 653, 657 (1977)). We then stated that that reasoning was especially applicable where, as in Taylor and the instant case, the parties have been married for twenty years. See id. at 1324.

Here, it seems that the effect of Husband's premarital contribution has been largely discounted by the trial court based on the length of the parties' marriage and the parties' combined efforts to maximize their assets. Husband presented no evidence either to the trial court or on appeal that his premarital contribution was not treated in this manner. Thus, the trial court's omissions are not clearly erroneous.

Husband also implies that the trial court erred in awarding all of the parties' retirement accounts to Wife. But Husband cites no authority supporting his suggestion that a court is required to distribute marital assets in the form of retirement accounts differently than other marital assets. Hence, Husband has waived that argument. See, e.g., Sims v. U.S. Fid. & Guar. Co., 782 N.E.2d 345, 353 (Ind. 2003).

MBC

Last, Husband challenges the trial court's valuation of MBC and his interest therein. At trial, both parties called expert witnesses to testify to the value of MBC and Husband's interest. In its order, the trial court explicitly adopted the reasoning of Wife's expert on both issues. In reaching that decision, the trial court clearly, even if not expressly, found Wife's expert to be the most credible witness on those issues. Although Husband maintains that this was an error, we will not reassess the credibility of witnesses. Dall, 681 N.E.2d at 720. And we are not persuaded by Husband's attempts to couch his argument in terms of the trial court's obligation to adequately explain its decisions. The trial court clearly stated that it was relying on Wife's expert. Husband's attempt to display an inadequacy in the trial court's decision assumes that we will weigh his experts' testimony on appeal. But we will not reweigh the evidence. Id. The trial court's reliance on Wife's expert was not clearly erroneous.[1]

In his Reply Brief, Husband argues that this issue is controlled by our supreme court's decision in Eyler v. Eyler, 492 N.E.2d 1071 (Ind. 1986). We cannot agree. In Eyler, our supreme court held that a trial court erred with respect to the manner in which a minority interest discount was applied. Specifically, the court held that the owned shares, constituting a 90.2% share of the business, were at all relevant times held in joint ownership by both spouses and "not burdened by the factors which may warrant consideration of the 'minority interest' discount." Id. at 1074.

Husband's position that Eyler requires a trial court to always apply a minority

[1] We note that this holding extends to Husband's argument that the trial court erred in not considering the purported Cole Brothers debt, which Wife's MBC expert did not take into account when valuing MBC.

interest discount plainly misapplies Eyler. Here, Husband's interest in MBC was an undisputed 23% and not jointly held. Hence, Eyler is inapposite. Further, at no point in Eyler did our supreme court hold that applying a minority interest discount is mandatory when a minority interest exists, as Husband now asserts. And since a minority interest discount is not automatically part of a share's value, to reach such a holding would ignore the deference our appellate courts give to trial courts in the assessment of evidence. Of the experts presented to the trial court here, the court chose to rely on Wife's expert over Husband's. Husband's expert utilized a minority interest discount in determining the value of the MBC shares, whereas Wife's expert did not. It was within the trial court's discretion to determine whether a minority interest discount ought to apply. We cannot say that the trial court's findings on those issues are clearly erroneous.

Division of Martial Assets

Husband argues that the trial court abused its discretion in awarding an unequal division of the marital assets. Indiana Code Section 31-15-7-5 states: "The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence . . . that an equal division would not be just and reasonable . . . ." The statute then lists examples of relevant factors. Hence, under Indiana law, the trial court is required to make an equal division of property, unless an unequal division is just and reasonable. Galloway v. Galloway, 855 N.E.2d 302, 305 (Ind. Ct. App. 2006). If the trial court finds reasons to rebut the presumption of an equal division of the marital assets, it may divide the assets unevenly provided it sets forth its reasons for doing so.

Thompson v. Thompson, 811 N.E.2d 888, 921 (Ind. Ct. App. 2004), trans. denied.

Here, the trial court, after reciting the statutory factors, stated the following as relevant evidence supporting its unequal division of the marital property:

> Based upon the statutory factors and after giving due consideration to the evidence presented, and particularly the disparity between the parties[']income and earning potential and the additional responsibilities placed upon Wife as the physical custodian of the parties[']autistic child, which diminishes her ability to work more hours, the Court has concluded that division of the marital property on a substantially equal basis is not appropriate and that an unequal division favoring Wife would be just and reasonable.

Appellant's App. at 24. In other words, the court determined that Wife should be awarded a higher percentage of the marital assets based on her lower income, her lower earning potential, and her additional responsibilities with the parties' autistic child. Regarding the latter factor, the trial court specified that Wife's additional responsibilities with the autistic child diminished her ability to work more and create more income for herself. Thus, we are not persuaded by Husband's position on appeal that "[t]he trial court has failed to find sufficient facts to establish a basis to overcome the presumption of an equal division, nor to otherwise explain what and how it assessed each of the statutory factors." Appellant's Brief at 17. Based on the relevant facts stated by the court, we cannot say that the court abused its discretion in awarding Wife 65% of the marital assets. See also Thompson, 811 N.E.2d at 920-23.

Issue Two: Attorney's Fees

Husband next contends that the trial court abused its discretion when it ordered

him to pay $8,000 in Wife's attorney's fees.[2] Trial courts enjoy broad discretion in awarding allowances for attorney's fees. Quillen v. Quillen, 671 N.E.2d 98, 103 (Ind. 1996). Reversal is proper only where the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. Id. In assessing attorney's fees, the court may consider such factors as the amount of assets awarded to the parties, the relative earning ability of the parties, and which party initiated the action. Id.

On appeal, Husband criticizes the trial court for referencing a disparity in the parties' income and then distributing the marital property in the manner it did. But the parties' disparity in income, as well as the parties' relative earning abilities, are precisely factors the court should be considering in awarding attorney's fees. See id. Thus, we cannot say that the trial court abused its discretion in awarding Wife attorney's fees.

Nonetheless, Husband continues his argument on this issue by asserting that Wife's attorney took the case without a written fee agreement and on a contingency basis, contrary to Indiana Rule of Professional Conduct 1.5. However, Rule 1.5 plainly states that a written fee agreement between attorneys and their clients is only preferred, not mandatory. And Husband presents no evidence in support of his argument that Wife's attorney accepted the case on an inappropriate, contingent basis. Husband's other argument that Wife's attorney unnecessarily extended the litigation is equally baseless.

[2] Husband also appeals an additional $8,800 in attorney and appraiser's fees arising from a provisional order. However, provisional orders are appealable interlocutory orders as a matter of right. Dillon v. Dillon, 696 N.E.2d 85, 88 n.1 (Ind. Ct. App. 1998). Thus, appeal of a provisional order is waived at the time of the final judgment. Id. Because Husband did not raise an interlocutory appeal of the provisional order and a final judgment has been entered, he has waived this argument.

Cross-Appeal

On cross-appeal, Wife asserts that, although the trial court stated its intent was to divide the marital assets under a 65/35 split, the final numbers actually award her only 54%. Husband concedes the mathematical error, but responds by contending that, because amending the judgment to reflect the trial court's intent involves a substantial amount of money, we are without authority to make such an amendment. We cannot agree with Husband. In Sanjari, we amended a trial court's order that contained a mathematical error in the amount of $548.43. But nowhere in that case did we condition the exercise of our review on the size of the amendment. Thus, we amend the trial court's order to reflect the intended distribution of the marital assets.

Wife also claims on cross-appeal that the trial court erroneously determined the value of Husband's assets in Comerford & Co. Wife and Husband agree that $49,000 should have been included as a marital asset of Husband's. Husband conceded at trial that those payments were for a third party's purchase of an ownership interest in Comerford & Co., and the trial court's order clearly states that Husband had a one-third interest in Comerford & Co., consistent with the additional, yet omitted, $49,000. Hence, we remand to the trial court with instructions that it modify its order to reflect the additional $49,000.

Conclusion

We affirm the trial court's order in part, reverse in part, and remand with instructions. In reversing in part, we remand with instructions that the trial court's order be amended as follows: to Wife's assets, $30,000 is to be added for omitted inheritance;

to Husband's totals $2,030.70 in tax liability is to be added and $49,000 in omitted assets for Husband's interest in Comerford & Co. is to be included. Hence, Wife's total marital assets and debts are, respectively, $583,203.08 and $0.00. Husband's total marital assets and debts are, respectively, $1,219,559.03 and $163,903.57. The parties' combined total of marital assets, therefore, is $1,638,858.54, of which 65%, or $1,065,258.05, is awarded to Wife, and 35%, or $573,600.49, is awarded to Husband. As these figures do not take into account cash settlements, the trial court is instructed on remand to make any necessary recalculations to the cash settlement award and amend its decree accordingly. The trial court is affirmed in all other respects.

Affirmed in part, reversed in part, and remanded with instructions.

MAY, J., and MATHIAS, J., concur.